In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-26

ESTATE OF JOSEPH MIELE, DECEASED, NORMAN E. ALBERS, ET AL., EXECUTORS, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners brought this suit in the United States Tax Court, contesting the Commissioner's determination that distributions received by them in redemption of their preferred stock in A & S Transportation Co. were "essentially equivalent to a dividend" within the meaning of Section 302(b)(1) of the Internal Revenue Code of 1954, 26 U.S.C. 302(b)(1). The Tax Court sustained the Commissioner's determination (Pet. App. 1a-15a) and the court of appeals affirmed *per curiam* (Pet. App. 18a-19a). Petitioners here renew the contention, rejected by this Court in *United States* v. *Davis*, 397 U.S. 301, that a redemption arising out of a transaction having a business purpose cannot be essentially equivalent to a dividend under Section 302(b)(1).

1. Petitioners together owned virtually all the outstanding stock of A & S Transportation. In order that A & S Transportation could qualify for mortgage loan insurance from the Federal Maritime Commission, with respect to a loan it needed to purchase a new transport vessel, petitioners in 1959 increased the corporation's capitalization by investing an additional $150,000 in preferred stock, on a basis substantially *pro rata* to their existing common stock holdings. After the mortgage loan was repaid, A & S Transportation in 1965 and 1966 redeemed the preferred stock in two installments; the corporation's accumulated earnings and profits were sufficient to cover the entire amount of the redemption.

These facts do not differ substantially from those in *Davis,* where the additional capital investment, in the form of preferred stock, had been made to obtain a loan through the Reconstruction Finance Corporation. Petitioners suggest (Pet. 9-11) that the cases are factually distinguishable in that the taxpayer in *Davis* had had the choice of making his additional investment in the form of a loan rather than as preferred stock, whereas they allegedly were required by Maritime Commission regulations to make their additional investment in the form of equity capital. Yet petitioners properly stipulated at trial (Pet. 9), and the trial court found (Pet. App. 5a, 9a), that the Maritime Commission had in fact given petitioners the same option as in *Davis, i.e.,* of adding to their corporation's liquidity by either loan or preferred stock investment.[1] Thus this case is squarely controlled by this Court's holding in *Davis.*

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[1] Moreover, even if Maritime Commission regulations had required an equity investment as a condition for granting mortgage loan insurance, this would fall far short of "compulsion of Federal law" (Pet. 11); petitioners were not, of course, required by federal law to obtain mortgage insurance at all.

2. Petitioners advance no substantive reason why this Court should reconsider the issue decided in *Davis*; in contending that *Davis* was wrongly decided, they do no more (Pet. 6-9) than reiterate arguments that were expressly considered and rejected in that case. We believe *Davis* was correctly decided and that the issue decided there warrants no further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

DOJ-1973-08